Methodological Concerns in Studying Supreme Court Efficacy

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Only a few years ago it was customary and appropriate to begin an essay on Supreme Court efficacy by lamenting the paucity of empirical studies dealing with this problem. Such an introduction is no longer in order, since we have recently witnessed a flourishing of research on the actual consequences of judicial decisions. Both the appearance of at least one book of readings on Supreme Court impact (Becker, 1969) and the focusing of panels around this topic at political science conventions are indications of the emergence of "legal impact" as a significant field of scholarly inquiry.

Ironically, however, the proliferation of impact studies has muddled our understanding of judicial effectiveness as much as it has clarified it. After surveying the literature reporting the reactions of police, school teachers, draft board members, and the like to various Supreme Court decisions, one is bewildered if he attempts to relate, reconcile, or "propositionalize" the hodgepodge of findings that has accrued. We are left with the common sense truism that patterns of compliance and defiance with the Supreme Court vary–from decision to decision, from community to community, and from individual to individual. Such a trivial conclusion could have been reached by anyone who simply reads *Time Magazine* and notes, say, the continuation of police harassment of minorities and the decline of sex censorship.

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My contention is that the low yield of these studies is partially the result of their methodological inadequacy. In scrutinizing conclusions about Supreme Court efficacy, irrelevance, or impotence which are suggested by researchers, we are usually at a loss to understand the meaning or assess the validity of the propositions being advanced. What follows are some ideas for improving the conceptualization, design, and execution of projects intended to ascertain the repercussions of Supreme Court decisions.

A TYPOLOGY OF OUTCOMES

Much dissensus about the extent of Supreme Court efficacy is a result of differences in the range of consequences being investigated. There may be both immediate and long-range effects in the aftermath of decisions, and it is implausible to expect the latter to occur as frequently, or with as great an intensity, as the former. For example, it proves nothing to contrast President Truman's return of the steel mills to private industry directly after Youngstown Sheet and Tube Co. v. Sawyer (1952) with the persistence of intolerance against Jehovah's Witnesses after the flag salutes cases (Minersville School District v. Gobitis, 1940; West Virginia Board of Education v. Barnette, 1943). Certainly presumed effects more proximate to the action of the Supreme Court (such as a President's compliance with a specific court injunction) will have a higher probability of materializing than more remote contingencies (such as significant shifts of public opinion across the nation) which are affected by many other factors.

In order to build up an inventory of empirical propositions which can be meaningfully compared and theoretically integrated, it is essential that we develop a system of classifying diverse kinds of outcomes. In other words, it is important that scholars be more precise in conceptualizing the dependent variable of various impact studies so that we can stop putting apples and oranges in the same basket. To this end I suggest the following primitive typology of effects based on the apparent "causal distance" from the agent of change. This breakdown implies that there are crucial theoretical differences in processes required to effectuate social changes of varying magnitudes. The conditions necessary for Supreme Court efficacy are much more stringent when the people and institutions to be controlled are farther removed from the Court's range of command and less threatened by the force of its sanctions. It is much easier for the Supreme Court to curb a few cantankerous federal judges than to reallocate the fundamental values of the society.

Four major kinds of outcomes may be defined: specific implementation, hierarchical control, political impact, and social consequences. *Specific implementation* is the extent to which the Supreme Court obtains compliance from lower court judges with specific mandates, orders, and directives. We are

essentially asking whether parties who win in the Supreme Court wind up reaping the fruits of their victories outside the Court. Speaking to this question is a study conducted by the Harvard Law Review (1954) which traces the fates of cases requiring further litigation in state courts after the Supreme Court has ruled; it shows that half of the winners above wound up as losers when final judgments were rendered. Less systematically, Murphy (1959) has collected some particularly egregious examples of lower court insubordination, including a case in which a conviction excoriated by the Supreme Court because of racial bias in jury selection was allowed to stand by the Georgia Supreme Court—resulting in the electrocution of the hapless defendant. There is also a middle ground between successful and unsuccessful implementation, such as the ability of du Pont to delay divestiture of its General Motors stock for four years following the Supreme Court's ruling that du Pont's holdings violated antitrust laws (Abraham, 1967: 24-25).

The Supreme Court exercises *hierarchical control* of the judiciary when its holdings are considered to be authoritative statements of law by lower court judges dealing with similar issues. This kind of effect is more comprehensive than implementation since it involves the shaping of routine adjudication of cases and not just the righting of individual wrongs and the dispensing of equity among a few litigants. The Supreme Court's difficulty in controlling subordinate judges is documented in Peltason's (1961) study of judicial resistance to Brown v. Board of Education (1954). A more recent study shows that the Court's words in the Gault case (1967) granting substantial procedural rights to juvenile defendants have been largely ignored by lower-court judges in three large cities (Lefstein et al., 1969). Notwithstanding both the norms of the judicial role and oaths of office in support of the Constitution sworn to by judges, there is considerable variance in the deference which rank-and-file judges give to the Supreme Court.

Political impact is the responsiveness of government officials who receive new legal obligations as a result of Supreme Court decisions. It involves voluntary (or self-initiated) changes in behavior which occur in the absence of any court action, i.e., prior to the application of judicial coercion. Since seeking of judicial remedies to secure legal rights is infrequent, the Supreme Court's influence on American life depends largely on the willingness of elites to obey the "Supreme Law of the Land" and alter their behavior accordingly. Ironically, however, numerous studies (Yale Law Journal, 1967) of police interrogation practices show that the precise stipulations of Miranda v. Arizona (1966) have been only partially heeded by the enforcers of "law and order," and it is now clear that many public schools have wantonly ignored the school prayer decisions (Dolbeare and Hammond, 1969). Because many Supreme Court rulings are applicable to literally thousands of uncoordinated individuals and agencies, it is to be expected that the dimensions of noncom-

pliance will be greater than is true of judges whose actions are much more likely to be reviewed and reversed.

Social consequences are the broadest and most diffuse of all effects, but in the final analysis, they are the most important. The term is meant to denote the output of the political system—the authoritative allocation of values to the society. If the Supreme Court's decisions are followed by judges and officials charged with the responsibility of carrying them out, what difference does it make? How, if at all, is the fabric of society affected? What dislocations of social or economic life ensue? Notwithstanding the speculations of pundits, politicians, and professors, the answers to these questions are nowhere in sight due to the almost complete lack of research on the net results of Supreme Court decisions.

At least five types of social consequences can be identified: (1) regulation of behavior, (2) allocation of costs and benefits, (3) symbolic effects, (4) second-order consequences, (5) feedback. Let us examine them in turn.

The Court is a *regulator* of behavior when it effectively sets the parameters of behavior that may be engaged in with impunity. Regulation is positive when the Court constrains individuals by sustaining the use of sanctions against them; it is negative when the use of sanctions is prohibited and individuals are liberated from coercive measures and thus permitted to choose their own course of action. The openness of retail book stores which I found in my study of bookseller self-censorship (Levine, 1970) is an example of successful regulation by the Court, while the Court's growing concern about the protection of individual privacy ("the right to be let alone") has not seemed to stem the pervasive trend toward increased government intrusion into personal lives (Westin, 1967).[1] Although the regulatory function is one of the most significant government activities, we are by and large in the dark as to the Supreme Court's ability to exercise social control and draw the lines of individual freedom.

Directly related to regulation is *allocation:* who gains and who loses (or as Harold Lasswell [1958] put it, who gets what?). If the Court *is* able to manipulate behavior, does a redistribution of economic costs and benefits among various interests and individuals result, and if so, what does the new pattern look like? To the extent that the Court's support of antitrust laws has prevented or retarded industrial concentration, small businesses have gained at the expense of larger ones. If the Court in the 1969 term decides to invalidate welfare laws which set absolute maximum family allowances regardless of the number of dependents (Dandridge v. Williams, 1969) and the decision is followed by the affected states, increased costs will be incurred by taxpayers and increased benefits enjoyed by the families of the unemployed. The significance of the allocation problem is highlighted by the public furor created by the reapportionment decisions which surely raised the specter to

many of reconstituted legislatures collecting and dispensing the public purse in radically different ways.

The Court produces *symbolic effects* when its legitimacy and prestige attach to the interests and values it supports. It is often alleged that the Supreme Court's public stature is such that it can alter the balance of political forces by changing or reinforcing public attitudes, mobilizing support for innovative public policies, reassuring concerned publics and thus quelling further demands, or generating new political issues (Levine and Becker, 1969: 8-10). Arguments of this nature are more abundant than empirical findings, but there are inklings of evidence that the Court can indeed be a gadfly in the political process by distributing symbolic goods. The Court's consistency and unanimity in the school desegregation cases (in which there has not been one dissenting vote since 1954) is probably a major factor accounting for the accelerated increase of public acceptance of integration since Brown v. Board of Education (1954). By extending the constitutional rights of the poor (such as in Gideon v. Wainwright [1963] which guaranteed the right to counsel to indigents accused of felonies) the Court may pacify discontent about inequality by giving the illusion of a new order—even though major reforms require pressure on legislative and executive institutions. And the Court's heavy involvement with questions of police practice and due process is undoubtedly one (among many) factors contributing to the emergence of "law and order" as *the* dominant political issue in contemporary American politics. In this secular age, political symbols are fast replacing religion as both the opiate and intoxicant of the masses, and it may well be that the symbolic outcomes of Supreme Court decisions are an important input into other policy-making processes. Since men do *not* live by bread alone, the blessings, damnations, and graces which they receive from the preachers on the bench may be significant in determining how they ultimately feel, think, and act as political animals.

Second-order consequences of Supreme Court decisions are the resulting social changes that are unrelated to (and sometimes inconsistent with) the primary missions or goals of the Court. Although difficult to detect and subject to little research, these unintended consequences are often the basis of intense criticism thrust at the Court. So it is contended that the Warren Court contributed to the increased crime rate by extending the civil rights of defendants and encouraged sexual promiscuity by liberalizing obscenity norms. Sometimes the presumed side effects are deemed positive and are used to justify particular decisions. For example, many clergymen based their praise of the school prayer decisions on the assumption that there would be increased religious observances in the home and parents would assume new responsibility for the spiritual guidance of their children.[2] Since these kinds of assertions are often made by elites with a considerable following, and since

they often become the focus of heated controversy about the wisdom of judicial doctrines, one use of information on second-order consequences would be to reduce the public's gullibility for unwarranted conclusions. Furthermore, some second-order consequences inevitably do result from the development of public policies, and a Court with multiple goals and priorities should be able to proceed more rationally if it knows what the by-products of its decisions actually are.

This leads us to the last type of social consequence to be considered. The Supreme Court works under a serious handicap because of the lack of *feedback* which it receives about the consequences of its decisions. Feedback is used in the narrow cybernetic sense and alludes to those communications which enable decision makers to constantly correct and modify their behavior so that goals might be achieved more efficiently (Deutsch, 1966: Ch. 5, 11). To my knowledge, the Court has never attempted to monitor systematically the impact of its decisions so that it could adjust its policies according to the results being accomplished and the problems that are incurred; nor has it inspired other agencies to undertake such tasks. A notable exception is the careful charting of the snail-like pace of Southern school desegregation by both the federal government and civil rights groups which may have led to the abandoning of the "all deliberate speed" doctrine in October 1969, in favor of a flat rule requiring immediate desegregation (Alexander v. Holmes County Board of Education, 1969).

To the extent that the Supreme Court engages in conscious, problem-solving behavior and rationally tries to solve social, economic, and political problems, the development of feedback mechanisms would enable it to function with greater efficacy. And since the Court presently has neither the resources nor (apparently) the inclination to develop this kind of apparatus, it is important to study the circumstances and incentives which impel outsiders to provide such services for the Court. The selective gathering and dissemination of information about particular outcomes of Supreme Court decisions may, in the long run, be the most significant outcome of all—for it determines the extent to which and the areas in which the Court is able to learn from the experience of the past and make the necessary adjustments in devising policies for the future. Studying past failure may be the key to future success.

CLARIFYING CAUSAL RELATIONS

Hans Zetterberg (1965: Ch. 4) has pointed out that one common source of misunderstanding about propositions in social science is vagueness about the causal linkage between determinants and results. Many studies of Supreme Court efficacy have harbored such a weakness in failing to qualify the expected relation between decision and outcomes. It *should* be theoretically

obvious that even under optimal conditions the announcement of a rule of law by the Supreme Court does not create the instantaneous and drastic effects of a nuclear explosion, a stock market crash, or even a freeze on federal construction expenditures ordered by the President. Nevertheless many observers of the Court are constantly astonished and enraged when it turns out that the Court's words fail to turn the world inside out overnight. Most social scientists would sneer at the reasoning used in the old story of how a kingdom was lost for want of a nail in a horse's shoe, but it is equally faulty to expect a court decision to change the tide of history. To clear up some of this confusion, I shall now try to specify the logical connection among variables in propositions about the effectiveness of the Supreme Court.

First, the relations between decisions and outcomes are *probabilistic* rather than deterministic. If the Supreme Court acts, then some kinds of changes probably occur, but they do not invariably occur. In political science it is rare when phenomenon Y *always* follows phenomenon X and such relationships usually involve "micro-politics" (individual actions) rather than "macro-politics" (system behavior). The outcomes under study are usually quite complex events occurring in a wide range of contexts (e.g., from local political arenas to the national economy), so it is unreasonable to expect *one independent variable* to explain *all* of the observed variance. Correlations approaching 1.0 (i.e., *absolute* control of lower courts, *total* compliance by bureaucrats) are very unlikely; as we move further from the locus of Supreme Court commands and other social processes intervene, we should anticipate attenuated effects.

Second, the relations are *sequential.* In metaphysical terms, *all* causal relations require the effect to be preceded by the cause, but we can distinguish coextensive propositions where the time gap between cause and effect are minute (e.g., Boyle's Law) from those where it is considerable. Relations between Congressional seniority and influence over legislation are of the former variety in that the two variables change almost simultaneously: *as soon as* one serves x number of years, he *immediately* attains higher ranking committee assignments. Contrariwise, when the Supreme Court acts, outcomes occur *later* (and sometimes much later).

In discussing Supreme Court efficacy we are dealing with an indirect causal relationship in that other factors intervene between the initial cause and the ultimate effect. Decisions must be communicated to lower-court judges (normally by lawyers arguing cases), a process which is extremely slow. Bureaucrats must devise changes in routines and instruct lower-level personnel accordingly. The mass media must digest and diffuse judicial symbols to a generally disinterested audience. In light of all of these (and other) requisite events, it should not be surprising that outcomes are delayed, and it is suggested that researchers should wait for some period of time to transpire before assessing responses.

A good case in point is school desegregation in the Deep South which did not materialize beyond tokenism until ten years after Brown v. Board of Education (1954). Legitimate criticism of this tragic delay should not obfuscate the rather complex chain reaction of social processes triggered by the court decision which can be diagrammed as follows:

(1954)	(1955-1964)	(1965)	(1966-1968)	(1969)
Supreme Court Decision	**Political Controversy**	**Legislative Action**	**Administrative Action**	**Social Change**
(Desegregation ordered)	(Civil rights becomes issue)	(Congress prohibits funding segregated schools)	(HEW withholds funds from segregated schools)	(Substantial integration in Deep South)

If it is valid to claim that but for the 1954 decision the subsequent events would not have occurred (or would have been forestalled), then it is proper to consider the Supreme Court's action as a cause of a major social transformation even though much time elapsed between the decision and the outcomes.

Third, the relation is *contingent:* if the Court acts, certain outcomes will follow, but only if other circumstances prevail. A set of what Jones (1966) calls "leverage variables" controls the forcefulness of judicial decisions and determines the scope and intensity of their impact. Enough evidence has now been collected on the imperfect relation between decisions and outcomes ("the banality of noncompliance" [Dolbeare and Hammond, 1969: 6-12]) to spur researchers into a quest for factors which determine the degree of efficacy attained by the Court. The following is a partial list of necessary and/or sufficient conditions for Supreme Court efficacy that have been mentioned in the literature:

REQUISITES OF SUPREME COURT EFFICACY

Internal Supreme Court Processes (attributes of decisions)

(1) Clarity of announced policy (specific doctrines)

(2) Consensus on the Court (lack of dissents or concurring opinions)

(3) Periodic reiteration of rules

(4) Craftsmanship of opinions (persuasiveness of legal argument)

External Governmental Conditions

(1) Accurate communication to elites
(2) Positive reaction by public attorneys
(3) Official lawfulness (commitment to obey laws even when unliked)
(4) Low fiscal costs of compliance
(5) Political invulnerability of elites (security of position)
(6) Structural coordination of affected individuals (hierarchy)

Environment Conditions

(1) Strong public support of decisions
(2) Low intensity of opposition opinion
(3) Sympathetic treatment of decisions by media
(4) Favorable commentary by opinion leaders
(5) Substantial ensuing litigation relating to decision
(6) High ratio between resources of beneficiaries and resources of victims of decision
(7) Legitimacy of Supreme Court as rule-maker

One clear failing of the above hypothesized contingencies is their lack of a parsimonious and coherent theoretical framework. I think that our understanding of the conditions of Supreme Court efficacy would begin increasing cumulatively instead of sporadically if we dared to suggest explanations of fairly high generality to guide our inquiries. Utility theory (analysis of compliance in terms of costs and benefits to various actors) and dissonance theory (examination of alternative ways of reducing cognitive inconsistency between legal norms and contrary behavior) have been advanced to explain outcomes,[3] but these have been presented in rather casual form making it difficult to deduce specific propositions.

Other potentially fruitful bodies of social theory should also be explored while those mentioned above are elaborated. Learning theory would direct attention to the positive and negative reinforcements following reactions to decisions and conditioning certain kinds of responses. Communications theory would ask whether information about judicial doctrines is being rapidly transmitted to receivers and how much is lost (or distorted) as it travels through formal and informal channels of communication. Organization theory would focus on the lines of command within institutions and the conditions under which bureaucratic resistance to innovations such as legal change are broken down.

Building abstract models based on these theories will inevitably mean that we sacrifice realism to gain simplicity in our explanations,[4] but the long-run payoff of this strategy of inquiry may be that we eliminate the necessity of testing many untenable hypotheses and thus wasting scarce research resources. I would hope that as a result of such theory-building we would see fewer studies with totally inconclusive findings such as Birkby's (1966) failure to isolate any factors accounting for the wide variance in compliance with the Bible-reading decisions by the 152 school districts of Tennessee. Perhaps it just makes no sense to investigate various demographic attributes of areas affected by decisions or social background characteristics of individual decision makers (as Birkby did) if there are no sound reasons to expect such factors to make a difference. Students of Supreme Court efficacy should take a lesson from Karl Popper (1959: 11)[5] who reminds us that theories are nets and he who casts will catch.

The Supreme Court, then, is better understood as a *catalyst* of change rather than a singular effector of change. In order to predict when it will produce sociopolitical reactions, it is necessary to bring to bear more general ideas about the workings of political and social systems. But if we at least recognize the tenuous nature of the theoretical relationship between decisions and outcomes, perhaps we will lower our expectations of the Court and suffer less disillusionment when cherished decisions go down the political drain and sink into the lifeless pages of constitutional law tomes. The Supreme Court is *not* a Supreme Being.

COLLECTING VALID DATA

> The Fact is the first thing. Make sure of it. Get it perfectly clear. Polish it till it shines and sparkles like a gem. Then connect it with other facts. Examine it in relation to them, for in that lies its worth and its significance. It is of little use alone. So make it a diamond in the necklace, a stone, perhaps a cornerstone in your building.

The above words uttered by James Bryce (1909: 10) in his presidential address to the American Political Science Association are profoundly relevant to students of Supreme Court efficacy. The law-abidingness of government officials and employees are the outcomes subject to most empirical research, but the data generated often are invalid indicators of the dimensions of conformity to or deviance from the legal obligations imposed upon them by the Supreme Court.

Johnson's (1967) study of compliance with school prayer decision, for example, provides us with the reactions of school administrators and school board members as well as the attitudes of townspeople toward the Supreme

Court's decisions, but it never really ascertains whether religious exercises continued in the classroom. Since high level officials often blind themselves to what is going on below and cognitively screen out realities about illegitimate day-to-day practices (Dolbeare and Hammond, 1969: 10), relying on their reports about what happened is an unjustified act of faith. Furthermore, the study of one school district with only 2,000 residents in rural Illinois precludes any generalization to the larger social world.

The low visibility, high complexity, and multiplicity of many bureaucracies (including school systems) conceals and clouds many official actions, and it behooves us, first and foremost to penetrate this haze and expose the institutions to the light of day. To accomplish this task, imaginative and daring methods of data collection must be used even if they are crude and unsystematic. Probing and snooping in the fashion of a Ralph Nader may turn up more relevant evidence than the more orthodox techniques of social science, and it may be worth giving up some reliability to obtain large gains in validity.[6] To get "clean" data on what are frequently dirty dealings (or at least illegal ones) requires shrewdness, flexibility, tenacity—and guts.

As is true of political science generally, survey research has been the predominant method of studying outcomes of Supreme Court decisions. In addition to the normal sources of error contaminating interview data (e.g., the guinea pig effect, interviewer interaction effects, response sets [Webb et al., 1966: ch. 1]), which are serious in themselves, there are problems peculiar to impact research that reduce the payoff of this approach. Whereas most surveys are attempts to ascertain current opinions, attitudes, or beliefs of those questioned, interviewing individuals about governmental practices is intended to determine *facts about past behavior.* And the same fallibilities of memory and recall (e.g., selective perception and retention) that often invalidate or discredit the testimony of witnesses at trials cast doubt on the accuracy of respondents' descriptions of official conduct or misconduct. For example, in the Georgetown University study of police interrogation in Washington, D.C. following Miranda v. Arizona (Medalie et al., 1968), defendants were asked whether they had been informed of their procedural rights (to remain silent, and the like). However, one must be highly skeptical about the credibility of their recollections of exactly what transpired in the tense and frightening stationhouse atmosphere.

Besides these honest errors stemming from limited human capabilities, respondents often have a vested interest in consciously perverting the truth. If people tend to hesitate in relating unpopular views to interviewers because they fear social disapproval, then *a fortiori* people will be unlikely to admit engaging in illegal or unconstitutional behavior. Assurances of confidentiality made to respondents hardly eliminate apprehension that confessions of impropriety would be disclosed, resulting in censures or sanctions of various kinds. Even if anonymity is preserved in research reports, public attention

brought to noncompliance could threaten those who are trying to resist change.

Consequently, asking movie censors (Carmen, 1967) or district attorneys (Barth, 1968) whether they conform to Supreme Court guidelines on obscenity and inquiring of school teachers whether they lead prayers in class (Way, 1968: 204) is not much more revealing than it would be to ask taxpayers whether they declare all their income or fabricate any deductions. It is naive to expect people to incriminate themselves, and it can be assumed that those implicated in unlawful actions will generally take steps to conceal or whitewash them. People will lie to save their skins.

The same principle applies to those who are served or regulated by institutions subject to Court-imposed constraints. These parties may see real benefits to be gained by falsely alleging illegality. Large numbers of convicts interviewed by Trebach (1964) contended that they were denied constitutional rights, but surely many of them must have hoped for new appeals on the basis of such charges. The involved participant who has much at stake is not in a good position to be objective.

Where noncompliant behavior of institutions has been subject to much political controversy and public scrutiny, calculated attempts may be made at high levels of command to deny information to outsiders by ordering subordinates to remain silent when approached by interrogators. This is especially so when the leadership feels that changing practices in the direction of conformity would impede them in carrying out their central responsibilities. My own students were continually rebuffed in their attempts to interview FBI agents in Oregon about wiretapping practices in the aftermath of the Alderman, Ivanov, and Butenko (1969) cases (which require disclosure of electronic surveillance records to defendants whose telephones were tapped). In one instance, a student was told in no uncertain terms to refrain from further investigation.[7] Even if some individuals agree to talk, the small sample thus obtained is likely to be overrepresentative of those who are complying. Refusals to cooperate are common when people are under fire for their professional practices, and "no comment" in large numbers is the death toll for survey studies. As a result, some outcomes of Supreme Court decisions may be totally unresearchable through survey instruments.

But all is not despair. Various "unobtrusive measures" may be employed to gather better social intelligence. Although psychologists would quarrel with the old saying that seeing is believing, observational methods do have the great virtue of eliminating highly unreliable middlemen from the fact-finding process. Similarly, archival data (public and private records) are not ordinarily produced and distorted with the rummaging social scientist in mind; history does not lie (usually). Both of these sources of data come closer to "letting the facts speak for themselves"; they can provide relatively nonreactive and more objective measures of some outcomes of interest to us. Although neither

is a panacea, I think greater use of them would herald marked advances in our understanding of Supreme Court efficacy. To demonstrate their potential, I shall now describe some successful studies using unobtrusive measures and suggest other opportunities for their use yet to be seized upon and exploited by social scientists.

A number of studies have made good use of visible observation (where those being studied are aware of the researcher's presence) to examine outcomes. Three juvenile courts were systematically observed by a team of scholars for a period of three months following the 1967 Gault decision (which granted formal procedural rights to youthful defendants whose cases previously could be tried very informally) to discover the degree of hierarchical control maintained by the Supreme Court over lower courts. They found that in two of the courts, children were "frequently and sometimes flagrantly denied their constitutional rights." (Lefstein et al., 1969: 560). In quantitative terms, only 59 out of 148 youths were given full advice of their right to counsel and 101 out of 121 who lacked counsel were not informed about the privilege against self-incrimination. Subtle nuances also came to light by watching the train of events; even those judges who technically complied often recited the defendant's rights rapidly, ritualistically, and incomprehensibly so that the form and not the spirit of Gault was honored. Since judges are probably as self-serving as others, I doubt whether this rather stark portrayal of judicial lawlessness would have resulted from asking them whether they had revised their courtroom procedures to conform to Gault.

Conspicuous observation has also succeeded in documenting police disregard of the Miranda case in a least one urban community. Although police have complained bitterly about being "handcuffed" by the Supreme Court, students at Yale Law School who observed police interrogations around-the-clock in New Haven found that only 25 out of 118 suspects were informed of their rights (Yale Law Journal, 1967). After an initial period of caution, police apparently accustomed themselves to the presence of observers in the station and resumed their normal style of operation—thus exposing wholesale violations of constitutional rules.

It may be argued that in studies of this nature it is never clear whether actors under surveillance temporarily modify their behavior to present a good image to observers or at least to make their malfeasance appear less egregious. If this is what they are willing to reveal on stage, one might say, imagine what is happening when the curtain is drawn. It is a real enough problem, but it is still more difficult to erect and maintain a false front when faced with the pressures of the daily job situation and the necessities of accomplishing certain tasks than it is to mouth high-sounding abstract commitments to legality in the very artificial interview context. Institutionalized work routines (even those contravening legal norms) are not likely to be drastically upset for long periods of time simply because they are being scrutinized by normally innocuous cadres of social scientists.

Nevertheless, validity is increased substantially if observers attach themselves to the organizations they are studying. The subjects of impact research will certainly be more at ease and will put up fewer defenses if they feel they are dealing with sympathetic "insiders" who understand their plights and dilemmas rather than aloof "outsiders" who are coldly judging and perhaps condemning them. After several months of riding with police in squad cars on patrol and occasionally even assisting them with their duties (passing a flashlight, witnessing a confession, and the like), Skolnick (1967) developed such good rapport that he was allowed regularly to witness grossly unlawful raids and searches. True "participant observation" such as this can build strong interpersonal ties and win the confidence of those whose behavior is being examined. The more integrated into the system the social scientist becomes the more likely that he gets an accurate picture of what is going on instead of a "snow-job" tailor-made for his personal viewing.

Of course, obtaining this kind of access initially is a formidable task in itself since cooperation with social scientists generally offers no rewards and is usually perceived as a useless and unnecessary nuisance.[8] Furthermore, even if the observer receives total acceptance from those with whom he is interacting and inconspicuously blends in with the environment, there is always the lurking danger that they are unconsciously adjusting their behavior to meet his expectations. And if the participant observer participates more than he observes, his own objectivity may be impaired because he is co-opted into accepting the norms and perceptions of the group he is serving.

To obviate some of these problems, I propose (with some hesitation due to the ethical dilemmas raised) other observational methods to study outcomes which minimize the risk of reactivity by concealing the identity or presence of the observer. Eyewitness reports by informants who come in contact with those affected by Supreme Court decisions in the normal course of events can be useful if there is some assurance that they lack any strong biases which would prevent neutral observations. So, for example, public school children can be solicited to note and discuss the treatment of religion in their classrooms and telephone company employees might be induced to relate the extent to which telephones are tapped by the government. Because such individuals are alerted in advance to discern whether particular rules and criteria are being followed, it is a more valid technique than the *post hoc* interview. On the other hand, the situations are few where on-the-spot observers who are both disinterested and communicative can be found.

Consequently, a more feasible strategy is one of direct spying ("hidden observation") on or the infiltration of operations about which the Supreme Court has issued regulations and constraints. The only sure way of preventing artificially contrived displays of compliance is to disguise, camouflage, or hide the researcher—so that he becomes almost literally "a fly on the wall." This is axiomatic to law enforcement and national intelligence agencies which con-

stantly infiltrate organizations (such as protest movements and juvenile gangs) to search for illegal or subversive behavior, and I suggest reversing the process to uncover unlawful official conduct.[9] Police officers have been able to conceal successfully their ulterior motives and real allegiances when joining hippie communes and settlements which are very suspicious of newcomers and aliens, so it should not be inordinately difficult for social scientists (especially graduate students) to work their way into various social and political institutions which produce outcomes of interest. Working side by side with unknowing and unsuspecting police officers, Internal Revenue agents, welfare workers, and school administrators is an excellent vantage point from which to find out the day-to-day meaningfulness of Supreme Court decisions.

This mode of attack is quite limited to a highly dedicated and militant breed of researchers. The actual and alternative costs of such infiltration are high, as one must temporarily sever his ties with the academic community and lose the benefits which it offers (e.g., flexible hours, stimulating work, probably higher pay). Also, the strain of adopting the norms of a strange and uncomfortable role requiring the performance of unpleasant tasks and the tension arising from living under false pretenses will deter most individuals. However, those who are willing to bear the strenuous burdens of a dual life may well be justly compensated with rich and exciting data about significant political processes.

A less demanding approach is secret observation of natural situations. The drawbacks of my own study of the effects of the Supreme Court's obscenity decisions on bookseller self-censorship point to the potential of this method (Levine, 1970). To ascertain the openness of the retail book trade, I sent a mail questionnaire to 250 booksellers in twelve states asking them about their book selection policies and whether they stocked ten specific books dealing with sex. Since there are many good reasons why booksellers might falsify their responses, it would have been much better simply to browse through various book stores and take a visual inventory of the "sex books" for sale. Indeed, I must frankly admit that a personal tour which I recently made of the "smut shops" on New York's Forty-Second Street was a better measure of freedom in the urban bookstore than the costly and time-consuming survey which I conducted.

Because the observer is himself unobserved or unnoticed, this kind of surveillance is an excellent way of obtaining valid factual data about behavioral outcomes. So, if we want to find out whether police respect civil liberties or whether protesters abide by restrictions authorized by the Supreme Court during demonstrations, we ought to have "plainclothes" social scientists trailing both groups incognito and recording the actions that take place. And to really boost validity, it makes sense to use devices such as tape recorders and cameras whenever possible to capture indelibly the words and events that occur. Psychologist Gordon Allport once said, if you want to know what

people think and how they feel, ask them (Selltiz et al., 1963: 236); I would add, if you want to know what they *do* and how they *behave*, watch them.

All the observational approaches just discussed may involve a high "dross rate," in that the situations in which Supreme Court decisions are relevant to the actor's behavior are rare. A large part of the patrolman's daily duties, for example, involves services to the community (e.g., retrieving cats from trees, filling out traffic accident reports) which have nothing to do with constitutional law. Rather than squander valuable resources scrutinizing such insignificant conduct, it may be more economical to examine some outcomes of Supreme Court decisions by experimentally manipulating the environment so that individuals are forced to decide whether or not to comply.

Data on the social consequences of Jones v. Mayer (1968) (which essentially forged a broad-gauged federal open housing law) might best be obtained by this kind of intervention by the researcher. Black and white observers could make consecutive visits to realtors and landlords to inquire about the purchase or rental of real estate. The extent to which the two races are treated uniformly would be a good measure of racial equality in the housing market. Since the researchers would have no intent to follow through on their requests and consummate any deals, this is clearly a form of entrapment. However, if the subjects remain unaware of the social experiment being performed on them, then their actions should be indicative of their normal *modus operandus* and a valid test of Supreme Court efficacy.

Many of these proposals raise very sticky questions of morality. Fundamental concerns such as invasion of privacy, breach of trust, and social manipulation certainly should be considered seriously prior to engaging in observational research. Individuals differ greatly in their sensitivity about and antagonism to various methods of research on human beings, so that some would find none of these methods distasteful while others would abhor even straightforward survey techniques as an unjustified interference with personal autonomy. The social sciences have barely confronted the question, and a consensus about professional ethics is far off on the horizon.

For myself, I would always ask whether the potential benefits from detecting illegality justify infringing upon the liberty and dignity of those being studied and whether the social values seemingly dependent upon compliance with the Supreme Court (e.g., free speech, due process) are of sufficient importance in my own calculus of preferences to merit tampering with individual lives. Others may disagree with this relativistic framing of the issue and favor absolute prohibitions of certain kinds of research, but suffice it to say that the intent of the present article is to present options which are technically feasible and to leave open questions about the propriety and wisdom of actually putting the various alternatives into practice.

Another source of data on outcomes which has gone largely untapped are the archives and documents of governmental and private institutions. This

genre of data can furnish us with motion pictures of events rather than the all-too-frequent snapshots which we get through interviews or isolated observations, so we are in a better position to judge the effects of the Supreme Court over time. From a practical standpoint, written documents are often inexpensive and accessible, enabling the researcher to carry on without mammoth financial support.

The running record, of course, is itself fraught with both systematic and random errors involved in recording aspects of human behavior, and (as any good historian knows) the longevity of what has been written does not correct original mistakes and distortions or fill in crucial omissions. For example, aggregate data on crime which would seem to be ideal for plotting second-order consequences of some Supreme Court decisions on defendants' rights are extremely misleading and unreliable because of the vagaries of crime reporting by the thousands of sundry law enforcement agencies. But at least the original producers of records and the amassers of descriptive statistics, as deceptive as they might be, do not usually orient their work to the visions of social scientists who may later appear on the scene and scrounge through their books. The recording, tabulating, and collecting of factual information is often a job responsibility or a legal burden, and for most individuals the eventual uses to which the data is put is the last thing on their minds.

Accrued records can sometimes provide measures of political impacts of decisions on governmental bodies. Since both federal and state agencies regularly take an accounting of the number of citizens represented in legislative districts, the effects of the reapportionment decisions on the legislatures can be best charted by using such data to construct indices of malapportionment (Schubert and Press, 1964). Similarly, data on actual Southern school desegregation collected by the United States Office of Education and the Southern Regional Council are ideal indicators of whether segregation has been eliminated with "all deliberate speed."

Readily available government budgets also can be rough indicators of political responses to decisions since many policies stipulated by the Supreme Court require substantial fiscal expenditures for broad implementation. So, one might ascertain the funds allocated by the Office of Economic Opportunity, state legislatures, and local councils for legal aid services to determine whether the right-to-counsel decisions have made much difference to indigents accused of crime. Likewise, budgetary data would reveal whether prodigious resources are being directed toward increasing the manpower of the juvenile courts—a clear necessity if the formal procedures intended to protect juvenile defendants ordered by the Supreme Court in the Gault decision are to be operationalized at the local level. When studying outcomes, money talks.

Culling of state legislation can reveal the extent to which Supreme Court legitimation of state laws spurs other states to follow suit. Removing the taint of possible unconstitutionality from proposed laws under debate may be an

important factor in securing passage and initiating new programs, so it is important to study this generally neglected "bandwagon effect." A simple search of the law library would show whether a rash of states enacted "stop and frisk" laws after they were sustained in Terry v. Ohio (1967). The statute books would also quickly tell whether the Supreme Court's approval, in Ginsberg v. New York (1968), of the New York law which sets up a specially restrictive obscenity standard for minors has been copied by other states as a means of salvaging their constantly attacked obscenity regulations. The public record is often the best source of those outcomes which are public events.

Finally a wealth of data on social consequences of Supreme Court decisions lies in store for those who would creatively peruse written records and sort out the wheat from very abundant chaff. Indeed, there is a nascent academic field exclusively concerned with the development of adequate "social indicators"—indices to the socially important conditions of society (Bauer, 1966).[10] Recognizing the barriers to obtaining reliable data on the state of the nation ("measuring the unmeasurable"), some scholars are nonetheless beginning to look for the "least worst" measures of the society's health, security, and freedom.[11] Also, data banks are being created to make data from diverse and remote sources conveniently accessible to researchers; we now even have a "Riot Data Clearinghouse" (at Brandeis University) which is a repository for facts about urban disorders and violence. Students of Supreme Court efficacy would do well to seize upon such data as they accumulate and plug them into their own hypotheses about the long-range consequences of decisions.

Even now, records pertinent to a variety of social consequences of a somewhat lesser scale abound. This is especially true of economic effects which are subject to much easier quantification and summation. The efficacy of the Supreme Court's consistent support and extension of anti-trust laws in the last few decades could be tested by looking at data on the concentration of ownership in various industries. Federal income tax law is another area in which the Court continues to make economic policy, and, with the cooperation of the Internal Revenue Service, one could check whether taxpayers are taking heed of the Court's rulings.[12] For example, a sample of returns of the rapidly increasing number of taxpayers involved in divorce litigation might be examined to see whether they have stopped deducting legal fees since the Court declared that such expenses are nondeductible (United States v. Gilmore, 1963). In still another issue area, one might correlate the varying degrees of favoritism shown by the Court to organized labor over the years with the rate at which union membership has risen to examine the Court's effects on labor-management relations. There is a wealth of statistical data available to help judge whether the Supreme Court has had much of a voice on how economic power and resources have been divided and distributed.

The mass media contain partial answers to many questions about outcomes.

Content analysis of crime stories in newspapers might show whether reporters have curtailed and restrained their pretrial coverage since the Supreme Court ruled in Sheppard v. Maxwell (1966) that massive press publicity prejudices the rights of defendants to a fair trial and thus violates due process of law. The consequences of New York Times v. Sullivan (1964), which held that public officials cannot recover libel damages for criticism of their conduct in office unless malice can be proven, could be studied by checking whether political writing has become more hostile, rash, or inflammatory since the decision. One could turn to the entertainment sections of newspapers and scan the advertisements of movie theaters as one way of probing whether the Court's premissiveness toward depictions of sexuality has resulted in more erotic movie fare (i.e., "freedom of the arts") in various localities. Methodically sifting through old newspapers in dusty library rooms may not provide the fun or the glory of "going out into the field," but the dividends of this kind of tedious research may in some cases be far greater.

To summarize this section, I might invoke an old Biblical adage: seek and ye shall find. Indicators of Supreme Court outcomes do not stare us in the face; creative planning and aggressive searching are needed to ferret out the facts. Clearly, some measures will be oblique and tenuous (especially where behavior is being intentionally masked), but these failings can be overcome by using several sets of data to zero in on or "triangulate" our hypotheses about Supreme Court efficacy.[13] Even if interviews are the sole source of data, we can have greater confidence in the findings if the opinions of respondents having very different vantage points and interests are sought.[14] The working rules of the detective, "running down every lead" and "checking all the angles" should be among our cardinal methodological tenets.

INFERRING CAUSATION

A central difficulty in demonstrating Supreme Court efficacy is establishing the causal relation between decisions and subsequent behavioral events. No matter how valid the data which is collected, it will prove little if the basic research design does not permit legitimate inferences about causation. What is necessary is to try to eliminate alternative hypotheses which might explain the outcomes that have been observed.[15] Common sense tells us that an epidemic of armed robberies the week after the announcement of a decision like Miranda v. Arizona (1966) is not likely to have been caused by the Supreme Court, and a decline in the population of some Connecticut towns since 1965 probably did not result from the Court's invalidating of legislative bans on the sale of contraceptives in Griswold v. Connecticut (1965). Although these particular examples of untenable causal links are patently obvious and even ludicrous, many studies of Supreme Court outcomes can be faulted because of just this kind of fallacy.

Sorauf (1959) fell prey to this methodological pitfall when he investigated the repercussions of Zorach v. Clauson (1952) which upheld the constitutionality of "released time" programs. Enrollment statistics were collected showing that attendance in such programs had increased since the 1952 decision, but no steps were taken to control for other factors which might very well have accounted for the surge in participation. The expansion of such programs may have been due to mere population growth or it may have been a side effect of the migration of many parochial school students into public school systems. Or, the increase after Zorach may have simply been a continuation of a trend beginning long before Zorach was ever adjudicated—to be explained as a reaction to the inexorable secularization of American culture. Interpreting the data is sheer guesswork, and we have no way of pinning responsibility for the observed phenomena on the court.

I realize that it is not always easy to build in controls when designing research on Supreme Court efficacy, but some efforts can be made to isolate the effects specifically wrought by the Court. Lempert's excellent article (1966) on strategies of research design in legal impact studies covers much of the same ground, so I will limit myself to considerations peculiar to studies of the Supreme Court. One *caveat* is an order: the subject of causal inference in nonexperimental research opens up a Pandora's Box of tough and complex methodological issues,[16] and the following discussion is only intended to scratch the surface.

At the outset, the inadequacy of "one-shot" case studies must be emphasized. Although research on Supreme Court outcomes is often of this nature, Campbell and Stanley (1966: 6), two sophisticated methodologists, forcefully argue that "such studies have such an absence of control as to be of almost no scientific value." The previously discussed study of the implementation of *In re Gault* by three juvenile courts suffers from this kind of deficiency in that all of the observations were made after the decision. From the data which is presented, it is impossible to determine how much, if any, of the judges' conduct represented Court-induced innovation. One can only suppose, intuit, or recollect on the basis of earlier more casual observations what things were like in the days prior to Gault.

Since comparison is the *sine qua non* of science, the "before and after" design is one remedy for this defect (although a stop-gap one at that). Observation of individual, institutional, or system performance before Supreme Court decisions provides a base line enabling us to gauge the degree of change inaugurated after the Court's rulings. Many schools in border states remained segregated in the years following Brown v. Board of Education, but if this situation is contrasted with the well-nigh universal segregation in some of these states before Brown, the dramatic effects of the decision in this area are made clear.

Docketing of cases occurs up to a full year ahead of final disposition by the Court, so seasoned analysts can often predict decisions well in advance. If divisions on the Court have been infrequent or uneven and conjecture about results can be made with some confidence, then behavior in question can be observed in anticipation of the Court's decision. Thus Muir (1967) interviewed school personnel before and after the Bible reading decision (Abington Township School District v. Schempp, 1963) and was able to get data on how individuals in comfortable routines react when traditional ways are constitutionally undermined. After the decision, psychological processes of attitude change and rationalization were discernible because Muir knew how these people stood before their practices were deemed illegal.

An approximation of this method is to rely on reports of earlier studies to get soundings of predecision behavior. My own study of booksellers examined their policies only after a decade of liberal obscenity decisions starting with Roth v. United States (1957), but I could at least make some crude comparisons with the pre-Roth situation in the retail book industry by alluding to the dire reports of strict censorship noted in several law review articles appearing in the mid-1950s. This is at best a third-rate approach, however, since one must sometimes depend on unreplicable findings of dubious credibility; but it is still better than assuming implicitly what transpired earlier.

The before-and-after design has at least two major drawbacks. First, historical events other than Supreme Court decisions may have intervened and caused any changes that are detected. Undoubtedly, statistical data would show a sharp rise in the number of applications for conscientious objector status received by the Selective Service system between 1964 and 1966, but to attribute this to the Supreme Court's decision in United States v. Seeger (1965), which broadened the grounds for conscientious objection so that atheists and agnostics could qualify, would be to ignore the simultaneously occuring escalation of the Vietnam War and the growing momentum of the protest movement which were probably more significant factors. Similarly, increased marijuana prosecutions following Leary v. United States (1969), in which the conviction of Timothy Leary for failure to register illegal drugs was reversed, are apparently the result of an ongoing radical transformation of youth culture, and it would be preposterous to contend that the Supreme Court's vindication of a leading drug cultist inspired droves of youngsters to experiment with drugs. To show that the Court brought about certain outcomes, the researcher must convincingly reject arguments that other events taking place between the two observation points accounted for the changes that were observed.

A second difficulty relates to what statisticians call "regression effects"—the high probability that extreme occurences of some phenomenon will appear more moderate on subsequent measurements. Campbell and Ross (1968) have shown that the decline in traffic fatalities following the highly publicized

Connecticut speed crackdown would probably have taken place regardless of the state program because the years immediately preceding the crackdown featured an abnormally high accident rate. Likewise, the decrease in prosecution of Communists in the aftermath of Yates v. United States (1958), which narrowly restricted the applicability of the Smith Act, may well have occured even without the Court's decision because Yates came on the heels of one of the most vigorous campaigns in American history against alleged subversives. Actually, it is excesses of this nature that the Court is often trying to counter, and ironically they sometimes will subside without judicial action by the workings of statistical chance. By looking at only two points in time which may be highly atypical, we are unable to discover whether apparent outcomes are merely chance happenings resulting from the laws of probability.

These spurious effects can be somewhat controlled through time-series research in which behavior is plotted at various intervals before and after supreme court decisions. Idiosyncratic and transitory changes in behavior can be discounted if a long time period is examined, and changes effected by the Supreme Court should stand out over and above long-term trends caused by nonlegal factors. This approach is particularly appropriate where a Supreme Court decision marks an abrupt shift in policy, so we can expect to see outcomes which are sharp departures from the past.

This kind of research is most feasible when we are dealing with standardized data on outcomes (such as percentages) which can be meaningfully compared over time. Since national samples of people are often asked the same or similar questions in mass surveys conducted over the years and their responses are now being stored on computer tape in accessible data pools, the potential exists for quantifying and then comparing the state of public opinion on various issues to investigate some symbolic effects of Supreme Court decisions. Hyman and Sheatsley (1964) gathered opinion data from various polls since 1930 to chart changes in attitudes toward desegregation in the South and concluded that Brown v. Board of Education stimulated a rapid acceleration of the previously gradual trend toward acceptance of racial integration.

Other possibilities suggest themselves. By checking state welfare rolls at regular periods, it could be established whether Shapiro v. Thompson (1969), which overturned state laws that required minimum residence within the state to establish welfare eligibility, motivated large numbers of the unemployed to migrate to states paying high benefits from states offering a mere pittance. Longitudinal analysis of legislative roll-call votes could test whether the reapportionment decisions substantially altered the balance among and relative sizes of urban, rural, and suburban blocs in state legislatures. To find out if the famous "switch in time that saved nine" by the Supreme Court in 1937 resulted in more sympathetic treatment of organized labor by trial judges, one could collect yearly data from various jurisdictions on the percentage of

strike-breaking suits against unions in which management was successful in getting injunctions issued. My guess is that long-term data will rarely reveal striking differences, but that will only go to prove that the Supreme Court is not as powerful as both its friends and critics often assume.

A reformulation of the research problem makes another strategy viable. If we ask what the consequences of future rules yet to be laid down by the Supreme Court might be, then a straightforward comparison of the outcomes of alternative rules operative in different settings makes sense. Such research could optimize Supreme Court policy-making by giving the Justices a more solid idea of the likely repercussions of their action than their own personal hunches and speculations which are now often the basis (if not the written rationale) of their decisions. At the very least, studies like this might abate their worries about disastrous results which are sometimes envisaged and condemned by opponents of new doctrines under consideration.

The federal system of court organization is an ideal context in which to execute such comparative studies. States that are very similar in many attributes (demography and so on) are often governed by different laws, and this variation ("splits of authority") allows the investigator to track the social consequences of alternative legal policies. The states can be seen as laboratories and the lawmakers (legislatures and appellate courts) as social experimenters who conduct "trial runs" of rules before they are adopted on the national level.[17]

Using this approach, one could study, for example, the effectiveness of capital punishment as a deterrent to crime. States which have given up the death penalty can be compared with those which still maintain it to determine whether the former have had more homicides per capita than the latter. If there are no differences, the Supreme Court might be more willing to categorize this type of sentence as a "cruel and unusual punishment" which is prohibited by the Eighth Amendment.

In an intuitive way the Justices engage in this kind of comparative thinking all the time. In Harper v. Virginia (1966), which declared poll taxes in state elections unconstitutional, the Court must have ruminated on the degree of black disenfranchisement in states with and without taxes on voting.[18] The Court avowedly brought to bear various state experiences in deciding Mapp v. Ohio (1961) and concluded that among alternative means to prevent police from conducting improper searches, only the exclusionary rule (prohibiting the admission of illegally seized evidence in court) seemed to secure compliance with the Fourth Amendment. This empirical mentality is laudable, but it is no substitute for systematic comparisons of carefully collected data.

The above strategies may seem needlessly complex and cumbersome to some, but they represent the bare minimum of controls which must be applied in social research to guard against threats to validity. To be sure, it would be futile to try to emulate the elegant designs employed in experi-

mental sciences since it is virtually impossible to manipulate variables, structure the environment, or randomize subjects in studying outcomes of political processes. What should be done is to control pragmatically for as many extraneous factors as the data permit, and above all to remain constantly alert to the plausible rival hypotheses (other than Supreme Court efficacy) which might account for the observed outcomes.

CONCLUSIONS AND ASPIRATIONS

As the discipline of political science undergoes its "post-behavioral" self-analysis, there is growing sentiment that policy research should be high on the agenda of the profession in the coming years. It is becoming painfully clear in our absurdly unmanageable world that the "science of muddling through" (Lindblom, 1959) is no longer an adequate method of political decision-making, and more rational planning is necessary if we are to cope with the stresses and strains of modern society. Nowhere is this more true than in the cloistered chambers of the Supreme Court where the Justices often stumble blindly and haphazardly in quest of working rules of law that accomplish desired ends (Miller, 1964-1965).

A simple perusal of recent opinions of the Supreme Court attests to the ignorance of social and political realities on which many decisions are based. A good illustration is Williams v. Rhodes (1968) declaring it unconstitutional for Ohio to require fifteen percent of the electorate to sign petitions in order to get a third party on the ballot for the Presidency. A series of specific questions about the effects of electoral and party systems are raised by the Court, and the answers which they give rest on pure speculation. Does the two-party system encourage compromise and political stability? Do third parties frustrate majority will by making it easier for the second choice of a majority to be the winner? Is it easier for disaffected groups to work within the two-party system (if primaries are held) than to organize separate parties? Is multiple party choice helpful or confusing to voters? It is by no means self-evident what political arrangements best guarantee an equal voice for all citizens in the selection of public officials, and unfortunately the discipline of political science which should be vitally concerned with the consequences of constitutional rules has devoted woefully little attention to these kinds of issues.

Many other decisions suffer from a similar lack of information. The Court grants all defendants accused of major crimes the right to trial by jury (Duncan v. Louisiana, 1968), but it is not at all clear whether juries are less prejudiced and more objective than judges in resolving factual disputes. In the absence of an understanding of the psychopathology of alcoholism, conviction of chronic alcoholics for intoxication in public is approved against contentions

that such derelicts are powerless to change their behavior due to their irresistible compulsion to drink (Powell v. Texas. 1968). The Court wrestles with the wiretapping issue without sufficient evidence on the value or necessity of electronic eavesdropping to fight organized crime. In lieu of knowledge, the Court turns to past precedents–which are often irrelevant–and the eternal verities–which are often wrong.

A major theme running through modern jurisprudence since Holmes is that judges should look forward to the consequences of decisions instead of backwards toward axiomatic first principles. However, for courts to perform this predictive function, they need sound empirical studies which test prospective courses of action against reality (Mayo and Jones, 1964-1965). Unless these studies have a firm methodological foundation, the sophistry of the lawyers will merely be replaced by the pretentious sham of the social scientist. The urgency of the agonizing problems confronting the Supreme Court should not prompt scholars to present premature diagnoses and remedies based on hasty and ill-founded research.

My hope is that the methodological sensitivity and refinement which I am urging will not only give us a better understanding of the role of the Supreme Court in American life but will also facilitate more effective policy-making by the Court. The two goals are convergent as the ultimate criterion of valid theories, predictability, is the greatest asset of governing institutions. If there is to be any salvation for our troubled and frightened nation it is through rationality, and it is incumbent upon academia to lead the way in providing it.[19]

There is no better way to begin than to insist on intellectual integrity and humility in our capacity as advisors to the throne. The Supreme Court needs us–but only when we have something to say.

NOTES

1. See Westin (1967) for a comprehensive analysis of the cases concerned with the right to privacy.

2. Of the same order but even more broadly sweeping (and less justifiable) is Eldridge Cleaver's interpretation (1968: 192) of the importance of Brown v. Board of Education:

> If separation of the black and white people in America along the color line had the effect, in terms of social imagery, of separating the Mind from the Body–the oppressor whites usurping sovereignty by monopolizing the Mind, abdicating the Body and becoming bodiless Omnipotent Administrators and Ultrafeminines; and the oppressed blacks, divested of sovereignty and therefore of the mind, manifesting the body and becoming mindless Supermasculine Menials and Black Amazons–if this is so, then the 1954 U.S. Supreme Court decision in the case of Brown v. Board of Education, demolishing the principle of segregation of the races in public education

> and striking at the very root of the practice of segregation generally, was a major surgical operation performed by nine men in black robes on the racial Maginot Line which is imbedded as deep as sex or the lust for lucre in the schismatic American psyche. This piece of social surgery . . . is more marvelous than a successful heart transplant would be, for it was meant to graft the nation's Mind onto its Body and vice versa.

3. Utility theory is briefly discussed by Krislov (1965: ch. 6) and Levine and Becker (1969: 6-8). Dissonance theory has been applied by Muir (1967: ch. 4).

4. William Mitchell (1967) argues that this is a choice which social scientists must always make since the goals of simplicity and realism are to some extent antithetical.

5. The comment was originally made by the German poet Novalis.

6. Raymond Bauer (1966: 37) opts for this choice in doing research on impact of government policies by posing a rhetorical question: "Is it better to have a crude measure of the variable you are really interested in, or a precise measure of a variable which is only an approximation of what you are interested in?"

7. In this case the agent turned the interview around and began asking the student questions about *his* draft status and political activities. This intimidation was successful in shutting off further inquiry as the student, who was considering applying for a conscientious objector exemption, thought it would be prudent to select another class project.

8. On rare occasions social scientists do have something to offer (such as expertise) as an inducement to decision makers to open up their quarters. My colleague, Thomas Hovet, Jr., has developed a tacit exchange relationship with United Nations delegates and Secretariat officials whereby he gives them information on voting patterns and advice on strategy in return for close access to the negotiating process.

9. It is a standing joke that the FBI now has majority control of the American Communist Party.

10. A number of essays on this topic can be found in Bauer (1966).

11. A compendium of social indicators has been drawn together by a research team directed by economist Mancur Olsen under the auspices of the federal government. See U.S. Department of Health, Education and Welfare (1969).

12. In a study of the effectiveness of sanctions as a means of inducing compliance with tax laws, Richard Schwartz and Sonya Orleans (1967) received remarkable cooperation from the Internal Revenue Service who made available returns of groups of taxpayers who were the subject of a field experiment (without disclosing the identities of the individuals involved).

13. For a powerful exposition of the argument that multiple measures are necessary to test propositions in the social sciences, see Campbell and Fiske (1959).

14. For example, to reconstruct what transpires at draft board hearings, board members, clerks, and appellants all should be questioned.

15. This is the orientation of Campbell and Stanley (1966) in their rigorous critique of various research designs used in education studies.

16. For a thorough technical treatment of these issues, see Blalock (1961).

17. Where virtually all fifty states have the same policy which the Supreme Court is contemplating overriding, cross-national studies might shed light on the consequences to be expected. Should the Court some day seriously consider overruling Roth v. United States and declaring *all* obscenity laws unconstitutional infringements on the right of free speech, it might find it profitable to compare the social consequences of Denmark's "anything goes" policy on sexual speech with the more restricted situation in America. Of course, all kinds of social and cultural differences for which controls are lacking distinguish nations from each other, so extreme caution must be exercised when findings of this kind are interpreted.

18. I think Justice Douglas is being less than candid when he says, in a footnote, that "we do not stop to determine whether on this record the Virginia tax in its modern setting serves the . . . end [of excluding blacks from the polls]."

19. Karl Deutsch's (1966: 255) words, though overstated, express this notion pointedly: "All studies of politics, and all techniques and models suggested as instruments of political analysis, have this purpose: that men should be more able to act in politics with their eyes open."

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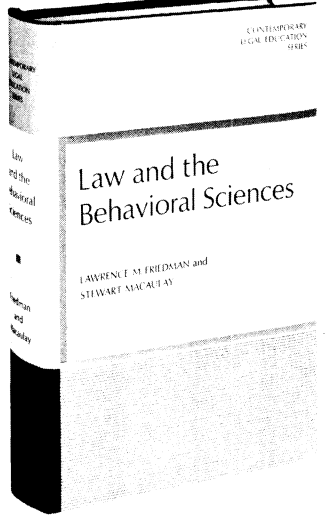

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